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CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.
No. 345.

A. J. BUCK, *Appellant*,
vs.
E. V. KUYKENDALL, Director of Public Works of the State of Washington, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF FILED BY THE FOLLOWING STATE REGULATORY COMMISSIONS, APPEARING AS *AMICI CURIAE*.

Alabama Public Service Commission.
Arizona Corporation Commission.
Railroad Commission of the State of California.
Public Utilities Commission of Colorado.
Board of Railroad Commissioners of Iowa.
Public Utilities Commission of Maine.
Department of Public Utilities of Massachusetts.
Board of Railroad Commissioners of Montana.
Nevada Public Service Commission.
New Hampshire Public Service Commission.
Board of Railroad Commissioners of North Dakota.
Public Utilities Commission of Ohio.
Oklahoma Corporation Commission.
Board of Railroad Commissioners of South Dakota.
Public Utilities Commission of Utah.
Virginia State Corporation Commission.
Wyoming Public Service Commission.
Public Service Commission of Maryland
Public Utilities Commission of Connecticut

BRIEF STATEMENT OF THE CASE.

The appellant desires to operate a line of motor vehicles between the cities of Seattle and Tacoma, in the

State of Washington, and Portland, in the State of Oregon, for the transportation of passengers for hire as a common carrier. The business is designed to be wholly interstate, no passengers being transported locally within the State of Washington. The route proposed to be passed over, within the State of Washington, is known as the "Pacific Highway," extending from Seattle to the Oregon boundary line at Vancouver, Washington, and was constructed or improved with federal aid, and in accordance with the provisions of the Federal Aid Act, enacted July 11, 1916, as amended by The Federal Highway Act, enacted November 9, 1921.

Chapter 111 of the Session Laws of 1921 of the State of Washington, as amended, provides full and comprehensive rules and regulations for the operation of motor vehicles on the public highways of Washington, including the requirement of license fees to be paid on each motor vehicle using the highway and by each motor vehicle operator. It is provided that no person may engage in auto transportation in that State without first obtaining from the Director of Public Works a certificate of convenience and necessity. Said law further provides that no certificate may be granted by said Director to operate in the same territory occupied by another certificate holder, unless the latter fails to obey the proper orders of said Director, and then only after a proper hearing. The appellee is the Director of Public Works in said State. The appellant applied to said Director for a certificate of convenience and necessity authorizing the operation of the applicant's proposed line of motor vehicles, and the same was refused.

The applicant then began this action in the United

States District Court for the Western District of Washington, asking that the appellee be enjoined from beginning any proceeding against him to enforce the penalties provided by Washington law for the operation of motor vehicles in auto transportation without procuring a certificate, as required by said Chapter 111 of the Session Laws of 1921, as amended. It was claimed that the provisions of said Chapter 111 amounted to a prohibition of interstate commerce, unlawful under the Commerce Clause of the Federal Constitution; and also that said Act of Congress of July 11, 1916, gave to the appellant a vested right to use said Pacific Highway, the same having been reconstructed with Federal aid.

The appellee filed his affidavit setting forth, among other things, that the Northern Pacific Railway Company, the Great Northern Railway Company, the Oregon-Washington Railroad & Navigation Company, and the American Railway Express Company are engaged in intrastate and interstate commerce and in the carriage of persons and property between the cities of Seattle, Washington, and Portland, Oregon, and intermediate points, said rail carriers furnishing freight, passenger and mail service, and said express company furnishing an express transportation service over the lines of said rail carriers, and that holders of certificates of convenience and necessity previously issued, authorizing them, respectively, to operate motor vehicles in auto transportation over designated portions of said Pacific Highway, had schedules so arranged, and bus stations so used in common, that persons desiring transportation by motor propelled vehicles interstate between Portland and points in the State of Washington along said Pacific Highway could obtain

continuous passage, and that said certificate holders were engaged in carrying passengers between said points in Washington and Portland and intermediate points.

Upon motion of the appellee the bill of the appellant was dismissed, and this appeal was thereupon taken.

The questions presented are the following:

1. In the absence of action by Congress, is it within the constitutional power of the State of Washington, in the regulation of the use of its highways, to prevent the operation of motor vehicles for common carrier purposes over such highway, until such operation has been found consistent with the public interest, and such finding has been evidenced by a certificate issued by the proper State authority.

2. Do the provisions of the Federal statutes providing for federal aid in the construction of post roads within the several states prevent such states, in the exercise of their powers to regulate the use, and provide for the maintenance, of their highways, from enforcing the payment of reasonable and non-discriminatory license fees by all persons using such highways, including such post roads, for motor traffic?

INTEREST OF STATE COMMISSIONS FILING THIS BRIEF.

The State commissions filing this brief exercise jurisdiction over the issuance of certificates of convenience and necessity for the operation of motor vehicles for common carrier purposes. They are interested in the decision that may be rendered herein because, if the appeal shall be sustained, the decision may affect their power to serve the public in their respective states in the manner provided by their laws. They

therefore file this brief, pursuant to leave of court, in support of the proposition that the judgment of the District Court should be affirmed.

POINTS TO BE DISCUSSED.

The argument herein will be addressed to the following propositions:

1. In the exercise of their police powers, reserved to them under the Federal Constitution, the states may enact legislation in aid of the health, safety and general welfare of their citizens, even though the same may incidentally affect interstate commerce.

2. The legislation of the State of Washington, and the action of its Department of Public Works thereunder, constituted a reasonable and proper exercise of the State's sovereign power.

3. The Federal statutes providing for Federal aid to the states in the construction of post roads in no way conflict with such exercise of the State's power of regulation of its highways as is complained of in this case.

PRELIMINARY DISCUSSION.

The sudden development of motor vehicles has been one of the most phenomenal of the economic developments of the last twenty-five years. In that short space of time the automobile and the motor truck have come into almost universal use for purposes both of pleasure and of business. Highways that were sufficient for horse-drawn vehicles are insufficient for motor vehicles, and the country has accordingly suddenly been covered with improved highways along the lines of densest traffic. The transformation has cost immense

sums of money, which in most states have in large part been raised by long time bonds. Aid has also been received from the Federal Government.

These highways are crowded with passenger automobiles and with motor trucks moving freight in private business; and more and more they are also sought to be used as ways for large trucks and motor buses operated as common carriers for the transportation of freight and passengers.

The multiplication upon the highways of heavy, high-powered vehicles, operated at high speed, produces conditions of danger which were unknown in the days of horse-drawn vehicles. And the intensive use to which they are put by such vehicles is destructive to the highways themselves. To enable the control of the traffic upon these highways in such manner as to permit of their maximum usefulness, and to ensure the safety of persons traveling thereon and the preservation of the highways from destruction by improper use makes necessary governmental regulation of motor vehicle operation both interstate and intrastate. This case presents the question whether the Federal Constitution disables the several states from supplying that regulation, as to interstate vehicles, and compels them to suffer the lack of it unless and until Congress shall legislate.

Every State has in fact passed laws regulating the operation of motor vehicles—statutes requiring the payment of fees designed to be used for highway maintenance, statutes requiring the licensing of operators, speed regulating statutes, maximum load statutes, statutes providing for night lighting and the like. Such requirements are examples of the exercise of that residuary power of sovereignty under which the vari-

ous states have been enabled to cope with developing social and economic conditions. particularly those which affect the health, safety and general welfare of their people.*

One of the most difficult problems which has accompanied this development of motor transportation concerns the operation of automobiles and motor trucks as vehicles of common carriage for the transportation of persons and property for hire. Such operations first attained importance a few years ago when numbers of so-called "jitney-busses" suddenly appeared on city streets throughout the country. Later came "stages" of various types conveying travelers over the public highways from town to town, and in many states, particularly in the West, the development of such organized motor transportation has been enormous, not only for the carriage of persons, but also for the hauling of great quantities of manufactured goods and products of husbandry over regularly established routes at regularly established rates. The business has become one of large economic importance. Its similarity in legal aspect to the business of the "common carrier," familiar to the common law, is unmistakable. It has everywhere been recognized by the courts, and the control and regulation of this newly developed business by governmental authority, for the protection of the public interest, has been as inevitable as was the regulation of other types of enterprise closely affecting the public welfare, and at common

*As was said by Mr. Justice McKenna in the *Michigan Blue Sky Case* (*Merrick v. Halsey & Co.*, 242 U. S. 568; 61 L. ed. 498), while a written constitution places in unchanging form limitations upon legislative action, this "does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law."

law held to be "impressed with a public use," which have come under complete governmental regulation.

The regulation of motor vehicle operation both in private business and for common carrier purposes has come only through state legislation. In this respect the situation has been analogous to that which existed in the early history of our railroads. The first railroad in the United States was opend for operation in 1830. More than fifty years had passed, and the railroads had become a net work over the entire country, before the Federal Government exercised its predominant power to regulate them, as agencies of interstate commerce. This was not because there was no necessity for their regulation, but because such necessity first became manifest locally, and was met by state action. During this long period of non-exercise of regulatory power by the Federal Government, the states exercised powers of regulation which went far beyond those which they may now exercise, since Congress entered the field, and provided for the far-reaching regulation now exercised through the Interstate Commerce Commission.

The motor vehicle was first subjected to regulation for protection of public safety, and for the levying of taxes to provide funds for highway maintenance. The advent of the motor bus and the freight truck, operated as common carriers, has presented a difficult problem because it has brought a service which is of value to the public, which should accordingly be permitted a proper development, and yet it threatens the public with serious added dangers, both to the public safety, and to the preservation of the public highways. These are of such character that it is impossible to frame any statute which will permit such operation as is in the

public interest, and will yet prevent that which is detrimental to such interest.

Motor vehicles operated as common carriers, whether in passenger or freight service, are ordinarily more cumbersome and heavy, and carry greater loads, than privately operated vehicles. They therefore tend to overcrowd the highways, and to increase the hazards incident to travel thereon greatly out of proportion to the number of such vehicles, as compared with vehicles privately operated.

By reason of their weight, and the loads they carry, and the character of the service they perform, and the constancy of their operation, motor vehicles operated as common carriers injure the highways more than other vehicles.

Between large cities and through thickly settled communities, where the demand for transportation of freight and passengers is substantial, and where highly improved highways have been provided, the promise of financial profit from the operation of common carrier service by motor vehicles is such as naturally produces a great deal of competition, and the consequent crowding of large numbers of heavy busses and motor trucks upon highways already congested with privately operated motor vehicles. If no restriction is placed upon the operation of such common carrier vehicles, it is obvious that the number operated will exceed the public necessity therefor, and will thus subject the public to dangers that are unnecessary, and the public highways to useless wear and depreciation.

Furthermore it has been found that unrestricted competition in public utility service is not in the public interest, but results in duplication of investment, upon which a return is attempted to be obtained from

the public, resulting in higher rates than would be necessary but for such duplication. Also when competition becomes so intense that reasonable returns upon capital investment can not be realized the character of the service inevitably suffers in the end.

For all these reasons it is in the public interest that no more motor vehicle common carriers shall be operated than are necessary to meet the reasonable needs of the public.

It is essential in the public interest also, in determining the necessity for permitting the operation of such common carrier service by motor vehicles, that the extent to which transportation is already supplied by steam and electric lines shall be considered, and the effect of motor vehicle competition upon such lines, and upon their ability to serve the public efficiently.

The public interest in most of the several matters just mentioned can not be properly protected by statutes of general application. Each proposed operation must be considered under the circumstances that surround it. Regulation must accordingly be by an administrative official or board. It has usually been supplied by giving jurisdiction to the commission vested with regulatory power over other public service properties. Such is the form of regulation provided in the statute of Washington, the application of which to himself the appellant complains of.

One of the most important features of such regulation of common carrier vehicles ordinarily is the provision that no person may operate a common carrier vehicle without having first obtained from the regulating official or board a certificate declaring that public convenience and necessity requires such operation. In the instant case the statute specifically provides

that no certificate shall be granted for operation in territory already occupied by another certificate holder, unless such certificate holder has failed to conform to requirements imposed upon him by the regulating board.

Statutes requiring the procurance of a certificate of convenience and necessity, or some form of license, before one may begin the operation of a common carrier motor vehicle service, have been enacted in the following states:

State	*Regulating Board*	*Statute.*
Alabama	Public Service Commission	Code of 1923, Section 9795.
Arizona	Corporation Commission	Chapter 130, Laws of 1919, Section 3 (a).
California	Railroad Commission	Chapter 213, Statutes 1917; amended by Chapter 280, Statutes 1918, Section 5.
Colorado	Public Utilities Commission	Chapter 127, Laws of 1913, as amended April 9, 1915, and April 16, 1917, Section 35.
Connecticut	Public Utilities Commission	An Act Concerning Public Service, Motor Vehicles, etc. Laws of 1921, Section 3.
Idaho	Public Utilities Commission	Idaho C. S. Sections 2439 and 2940 required the procurance from the Public Utilities Commission, and the payment of certain fees therefor, with certain exceptions. In *State v. Crosson*, 33 Idaho 140, this statute was held unconstitutional, the court saying that the tax was not levied upon the respondents "because of their use of the public highways with their vehicles," but as an occupation tax, and that as an occupation tax it was void by reason of the exceptions.
Illinois	Commerce Commission	Illinois Commerce Commission Law, approved June 29, 1921, Section 55.
Iowa	Board of Railroad Commissioners	Chapter 97, Laws of 1923, Section 4.
Kentucky	State Highway Commission	Chapter 81, Laws of 1923, Section 4.
Maine	Public Utilities Commission	Chapter 211, Public Laws of 1923, Section 4.
Maryland	Public Service Commission	Public Service Commission Law of Maryland, as amended by Section 3 of Ch. 401 of the Acts of 1922, Section 1½.
Massachusetts	Department of Public Utilities	Chapter 159, Laws of Massachusetts, Section 45. (License to operate must be obtained from City Council or Selectmen. The Department of Public Works upon appeal may prescribe rules and regulations.)

State	*Regulating Board*	*Statute.*
Michigan	Public Utilities Commission	Chapter 209, Public Acts of Michigan, 1922.
Montana	Board of Railroad Commissioners	Chapter 154, Session Laws, 1923, Section 4.
Nevada	Public Service Commission	An Act to Regulate the Use and Operation of Motor Trucks, etc., approved March 21, 1923, Sections 4 and 9. (Certificates obtained through County Commissioners, with right of appeal to Public Service Commission.)
New Hampshire	Public Service Commission	Chapter 86 of the Laws of 1919, as amended by Chapter 59, Laws of 1921, Section 2.
New Jersey	Board of Public Utility Commissioners	Chapter 195 Laws of 1911, as Amended, Section 24.
New York	Public Service Commission	Chapter 219, Laws of 1909, as Amended by Chapter 667, Laws of 1915, Section 23.
North Dakota	Board of Railroad Commissioners	Chapter 136, Session Laws of 1923, Section 4.
Ohio	Public Utilities Commission	House Bill No. 474, Session Laws 1924, Section 614-87.
Oklahoma	Corporation Commission	Chapter 113, Session Laws, 1923, Section 4.
Oregon	Public Service Commission	Chapter 10, General Laws of Oregon, Special Session, 1921, Section 4.
Pennsylvania	Public Service Commission	The Public Service Company Law, approved July 26, 1913, P. L. 1374, Article I, Section 1, and Article II, Section 2 (a) and (b).
Rhode Island	Public Utilities Commission	Chapter 2221, January Session 1922, Section 3.
South Dakota	Board of Railroad Commissioners	Chapter 124, Laws of 1923, Section 3.
Utah	Public Utilities Commission	Compiled Laws of Utah, 1917, Section 4818.
Virginia	State Corporation Commission	Chapter 161, Acts of 1923, as amended March 14, 1924, Section 3.
Washington	Department of Public Works	Chapter 111, Session Laws of 1921, Section 4.
West Virginia	Public Service Commission	Chapter 112, Acts of 1921, as amended by Chapters 5 and 6, Acts of 1923, Section 82.
Wisconsin	Railroad Commission	Chapter 546, Laws of 1915, Section 1797-64.
Wyoming	Public Service Commission	Chapter 146, Session Laws 1915, as amended by Chapter 74 Session Laws 1917, and Chapter 38 Session Laws 1919, Section 45. (The Act does not specifically apply to common carriers motor vehicles, but has been construed so to apply by the Attorney General of Wyoming.)

The fact that such legislation has been enacted by so many states is in itself proof that unregulated competition in motor vehicle common carrier service produces conditions which are widely believed to demand

a legislative remedy. No law providing for the regulation of motor vehicles engaged in interstate commerce has been enacted by Congress. Do the statutes which have been enacted by these states, and other statutes enacted in various forms in all the states imposing regulation in varying degrees upon all motor vehicles, represent, so far as vehicles operating interstate are concerned, mere abortive attempts to meet the necessity for such regulation, or are they effective regulations properly imposed by the states under sovereign powers reserved to them under the Federal Constitution?

IN THE EXERCISE OF THEIR POLICE POWERS, RESERVED TO THEM UNDER THE FEDERAL CONSTITUTION, THE STATES MAY ENACT LEGISLATION IN AID OF THE HEALTH, SAFETY AND GENERAL WELFARE OF THEIR CITIZENS, EVEN THOUGH THE SAME MAY INCIDENTALLY AFFECT INTERSTATE COMMERCE.

The questions presented by this case in principle was long ago fully considered and determined by this court in *Cooley v. Port Wardens,* 12 Howard 299, 318. The precise question presented in that case was whether, in the absence of conflicting federal legislation, a state might regulate pilots and pilot charges. It was urged that, as to ships engaged in interstate commerce, such regulation was regulation of interstate commerce, and exclusively within the power of Congress, under the commerce clause. Denying the contention as to the effect to be given the commerce clause, the court said:

"The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the State, then it would be in conformity with the contemporary exposition of the Constitution (Federalist No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulation. * * *

Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects quite unlike in their nature; some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. * * *

> Viewed in this light, so much of this Act of 1789 as declares that pilots shall continue to be regulated 'by such laws as the States may respectively hereafter enact for that purpose,' instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests that understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration,, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."

It was in conformity with the principle thus laid down that the several states for a period of more than fifty years supplied the only regulation to which interstate rail carriers were subjected, and that until now the states have supplied the obvious necessity for regulation of motor vehicles operated upon the public highways.

The power to impose this regulation has been called the police power. The extent of that power has never been defined, and is probably not capable of delimitation by definition. The California Supreme Court once pertinently declared that "The courts, even the highest court of the land, have despaired of giving a satisfactory definition to the police power of a state,—a definition which will delimit the boundaries of that power."* At the same time it was added that:

*Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640.

> "within the legitimate exercise of this great power comes the unquestioned right to place restrictions upon personal liberty and limitations upon the use of private property. One conspicuous example of the legitimate exercise of the police power is evidenced by the right of regulatory control exercised by courts, boards and commissions over property held in private ownership, but devoted by the owners to a public use."

"In commenting upon the police power in *Noble State Bank v. Haskell, et al.*, 219 U. S. 104, this court said:

> "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce."

No needs could be more primary to the successful carrying on of commerce over the highways of the country than that those highways shall be as free as may be possible from congestion, and that they be kept safe. In point of fact, the duty of a government to protect the safety of its citizens, and of others rightfully within its jurisdiction, is a duty paramount to all others, and hence the right of a state to keep its highways safe for public travel thereon is recognized by this court as more extensive than its right to make

regulations designed merely in aid of commerce. This was made clear in *Erie Railroad Company v. Board of Public Utility Commissioners,* 254 U. S. 394, 410.

In that case the State of New Jersey, acting through its Board of Public Utility Commissioners, had ordered the Erie Railroad to abolish certain grade crossings. The validity of the order was contested upon the ground that it imposed an undue burden upon interstate commerce. it was shown that compliance with it would cost over $2,000,000, and that the railroad had not more than $100,000 available. It was claimed that obligation to undertake such a large expenditure might result in the bankruptcy of the railroad, and that the order was unreasonable under the circumstances. This contention was discussed by the court, in its decision sustaining the order, as follows:

> "But it is argued that the order is unreasonable in the circumstances to which we have adverted, the principle applied to the regulation of public service corporations being invoked. *Mississippi R. Commission v. Mobile & O. R. Co.* 244 U. S. 388, 391, 61 L. ed. 1216, 1219, 37 Sup. Ct. Rep. 602; *Chicago, B. & Q. R. Co. v. Railroad Commission,* 237 U. S. 220, 59 L. ed. 926, P. U. R. 1915C, 309, 35 Sup. Ct. Rep. 560. *But the extent of the states' power varies in different cases from absolute to qualified,* somewhat as the privilege in respect of inflicting pecuniary damage varies. *The power of the state over grade crossings derives little light from cases on the power to regulate trains.*"
>
> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these

railroads were laid out, *or that the advent of automobiles has given them an additional claim to consideration.* They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. *Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is,* and from which, ultimately, the railroads derive their right to occupy the land, *has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power;* or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, *and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil.*" (Italics ours.)

The principles involved in the interpretation and application of the Commerce Clause of the Federal Constitution are too familiar to require any attempt to review the many cases in which the limits of residuary state power have been "pricked out by the gradual approach and contact of decisions on the opposing sides."* It is sufficient to say that it is clear that the

*Nobel State Bank v. Haskell, 219 U.S. 104.

authority of Congress over the modes and instruments of interstate commerce, in all of its forms, is plenary and paramount, so that whenever Congress acts all conflicting state legislation becomes ineffective, but that it is no less clear that, while the states may not at any time directly hamper or unreasonably burden that commerce, yet, in the absence of action by Congress, they may act in any reasonable non-arbitrary and non-discriminatory manner under their residuary sovereign powers in aid of the health, safety, and general welfare of their citizens, even though such action may affect interstate commerce.* And this doctrine applies even to instances wherein the regulation in question is "within the reach of the Federal power." A good illustration is found in the case of *Escanaba & L. M. Transp. Co. v. Chicago*,‡ in which this Court discussed the power of the City of Chicago, under the

*Among the many cases along this general line we cite the following illustrative cases:

Cooley v. Port Wardens, 12 How. 299, 320 (pilotage);
Sherlock v. Alling, 93 U. S. 99, 104 (marine torts);
Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 463 (quarantine inspection fee);
Smith v. Alabama, 124 U. S. 465 (licenses for locomotive engineers);
Nashville C. & St. L. Ry. Co. v. Alabama, 128 U. S. 96, 100 (prohibiting color blind persons from working on railways);
Hennington v. Georgia, 163 U. S. 299 (forbidding operation of freight trains on Sunday);
Missouri, Kans. & Texas Ry. Co. v. Haber, 169 U. S. 613, 626 (diseased cattle);
N. Y., N. H. & H. R. Co. v. N. Y., 165 U. S. 628, 631-2 (forbidding heating of passenger cars with stoves.)
Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285 (stopping of trains);
In Louisville & N. R. Co. v. Hughes, 201 Fed. 727, at pages 735 to 739, a large number of cases are collected.
Minnesota Rate Cases, 230 U. S. 352; 57 L. ed. 1511;

‡107 U. S. 678; 27 L. ed. 442.

authority of the State of Illinois, to regulate the closing of draws in the bridges over the Chicago River. Said the Court:

> "The Chicago River and its branches must * * * be deemed navigable waters of the United States, over which Congress, under its commercial power, may exercise control to the extent necessary to protect, preserve, and improve their free navigation.
>
> "But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. * * * When its (the State's) power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. * * * But until Congress acts on the subject, the power of the States over bridges across its navigable streams is plenary."

This does not mean, of course, that such reasons may be made the cloak for unjust or unreasonable discrimination or for arbitrary acts having no real relation to the public welfare, but we submit that it does mean that even where Congress may be "entitled to act, by virtue of its power to secure the complete government of interstate commerce, the State power, nevertheless, continues until Congress does act and by its valid interposition limits the exercise of the local authority." (*Minnesota Rate Cases, supra*). This holds true in the ordinary case even after Congress may have acted by

way of delegating specific administrative authority to some federal board or commission, the field entered remaining open to valid State action unless and until the federal body in question shall itself have acted in connection with and in regulation of the subject-matter under consideration. (*Mo. Pac. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612; 53 L. ed. 352; *Atl. C. L. R. R. Co. v. Georgia*, 234 U. S. 280.)

THE LEGISLATION OF THE STATE OF WASHINGTON, AND THE ACTION OF ITS DEPARTMENT OF PUBLIC WORKS, CONSTITUTED A REASONABLE AND PROPER EXERCISE OF THE STATE'S SOVEREIGN POWER.

State Regulation of Motor Vehicles in General.

As we have before said, all the States have to some extent asserted regulatory jurisdiction over motor vehicle traffic in general, designed both to promote public safety, and to procure revenue for maintenance of the highways used. This court has sustained such legislation very broadly and clearly.

In the case of *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, speaking through Mr. Justice McReynolds, it said:

> "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends upon good roads, the construction and maintenance of which are exceedingly expensive, and in recent years insistent demands have been made upon the States for better facilities; especially by the ever

> increasing number of those who own such vehicles. * * * In the absence of national legislation covering the subject, a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles, those moving in interstate commerce as well as others. * * * This is but an exercise of the police power, uniformly recognized as belonging to the States, and essential to the preservation of health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. * * * The amount of the charges and method of collection are primarily for determination by the State itself, and so long as they are reasonable, and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce. * * *"

In a later decision the Court, speaking through Mr. Justice Brandeis, declared:

> "The power of a State to regulate the use of motor vehicles on its highways has been recently considered by this Court and broadly sustained. It is extended to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded, as well as reasonable provisions to insure safety, and it is properly exercised in imposing a license fee, graduated according to the horsepower of the engine." (*Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222.)

These decisions would appear conclusively to determine that the general regulation of motor vehicle operation over their highways is a proper exercise of fundamental State powers, so long as it does not discriminate against or hinder the flow of interstate commerce.

State Regulation of Common Carriers by Automobile.

In our preliminary discussion in this brief we have pointed out the necessity which exists for regulation of motor vehicle common carrier traffic in particular, and have shown that it is a necessity which has been recognized in most States (See page 11 of this brief) by statutes imposing requirements additional to those which apply to ordinary motor vehicle operation. That such classification and additional regulation of such operations is proper has been determined in numerous cases* and it is clear that it does not constitute class legislation.

As mentioned above, an important factor in the regulation of motor stages is the usual requirement that any prospective operator of such a stage shall, as a condition precedent to commencing operations, procure a certificate declaring that public convenience and necessity require the service proposed to be undertaken. The situation is thus similar to that concerning the construction of proposed new lines of railroad or of the extension of old ones under the new "certificate provisions" of the Interstate Commerce Act. In consider-

*Nolen v. Reichman (D. C.) 225 Fed. 812; Lutz v. New Orleans (D. C.) 235 Fed. 978 affirmed in Lutze v. New Orleans (C. C. A. 5) 237 Fed. 1018, 150 C. C. A. 654; Schoenfeld v. Seattle (D. C.) 265 Fed. 726; Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; West v. Asbury Park, 89 N. J. Law, 402, 99 Atl. 190; Jitney Bus Association v. Wilkes-Barre, 256 Pa. 462, 100 Atl. 954; West Suburban Transportation Co. v. Chicago & West Towns Railway Co. (Ill.) 140 N. E. 56; Western Association v. Railroad Commission, 173 Cal. 802, 162 Pac. 391; New Orleans v. LeBlanc, 139 La. 113, 71 South. 348; Huston v. Des Moines, 176 Iowa, 455, 156 N. W. 883; Cummins v. Jones, 79 Or. 276, 155 Pac. 171; Desser v. Wichita, 96 Kan. 820; 153 Pac. 1194, L. R. A. 1916D, 246; *ex parte* Sullivan, 77 Tex. Cr. R. 72, 178 S. W. 537; Memphis v. Tennessee, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056; *ex parte* Dickey, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840; Motor Transit Co. v. Railroad Commission, 189 Cal. 573.

ing an application for such a certificate the commission or other administrative body in question does not and should not look to the desires of the particular individual or corporation before it, but rather to the general public welfare. If that welfare would be conserved and aided by the rendering of the proposed service and the applicant appears fitted to render it satisfactorily, the certificate may be granted; if otherwise, it may properly be denied.

Among the considerations to be given weight in this connection are: (1) the nature of the service which the applicant desires to render; (2) the nature and adequacy of service already being rendered by others; (3) the existing population and industries which give rise to a demand or need for such service and the probable future development thereof; (4) the likelihood that applicant can earn a fair return upon the investment which will be necessary; (5) the desirability of allowing such investment to be made by a public service enterprise under all the circumstances; and (6) the general character, reliability, responsibility and financial ability of the particular applicant himself. In connection with automobile stage applications, the administrative body must also carefully consider the possible seasonal nature of the business which may be expected, since one of the prime reqnisites of the public where automobile stages are concerned is reasonable continuity and reliability of service, even at off-peak periods. This renders particularly necessary the consideration of the nature of the service already being rendered by existing operators. As was said in a recent case by the California Supreme Court:

> "It is in the interest of the public that the service rendered by public utilities be adequate and

> of good quality and the rates as low as possible commensurate with good service and a reasonable return to the owner. The certificate of public convenience and necessity is the means whereby protection is given to the utility rendering adequate service at a reasonable rate against ruinous competition. The person or corporation obtaining a certificate must operate at the times and in the manner prescribed by such certificate, thus furnishing uniform and efficient service to the public. If anyone else would be at liberty to operate without such a certificate he might operate at his own pleasure and only under favorable conditions, thus making it impossible for the holder of the certificate to successfully carry on his business. It is the public interest in efficient service which is being safeguarded by the requirement of a certificate. (*Oro Electric Corp. v. Railroad Commission,* 169 Cal. 466, 475; *Public Utilities v. Garviloch,* 181 Pac. 272, P. U. R. 1919-E, p. 182.) Such requirement is part of the regulation of transportation companies in the interest of the public." (*Motor Transit Company v. Railroad Commission,* 189 Cal. 573.)

That this power to grant or withhold authority to engage in a semi-public calling is legitimate and proper within the limits of the residuary powers of the States can, we submit, admit of no argument. It has been universally upheld by the courts. It may not, of course, be arbitrarily exercised, but the presumption is that an administrative body has exercised its powers in a lawful manner (*Cooke v. Halsey,* 16 Peters 171, 10 L. ed. 891) and if it acts reasonably and non-arbitrarily for the conservation of the general welfare, its actions will be held valid, since—

> "The granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public." (*Oro Electric Corp. v. Railroad Commission,* 169 Cal. 466; citing *People v. Wilcox,* 207 N. Y. 86.)

Not only is the general welfare involved in the case of automobile stages, but public safety and health are directly concerned, and the State is peculiarly interested in such operations, since they are carried on over its highways, built at public expense and for the general use of all the people, for—

> "Authority to use the public highways as a common carrier of passengers for hire is not a right belonging to the individual, but it is in the nature of a privilege. * * * Due consideration for the safety of the public requires that a careful selection should be made of the individuals to whom authority is given to use the public highways as carriers of passengers for hire." (*Gizzarelli v. Presbrey,* Supreme Court of Rhode Island, 117 Atl. 359.)

If the authorities to which we have referred establish, as we believe they do, that the regulation of motor vehicles operated as common carriers is a proper subject for action by the several States in the exercise of sovereign powers reserved to them, such regulation necessarily includes the power to deny applications for authority to operate when such operation will be inconsistent with the public interest. If this be so, then the mere fact that any particular operator proposes to

run his stage across a state line can not, in and of itself, render the State powerless to deny his request for such a certificate, irrespective of the circumstances. Otherwise a State, having provided a system of highways adequate to the private uses of its citizens, and of the citizens of other States, and adequate also to meet the demands of all necessary common carrier uses, both state and interstate, would be, by reason of the Federal Constitution, impotent to prevent such highways from being overcrowded, and rendered insufficient and unsafe through the operation thereon of an unnecessary number of motor vehicles competing with each other in common carrier service.

Either motor vehicles so operating across state lines are free from State regulation, as to engaging in business, and may so engage in such numbers as they will, or they may be compelled to procure authority to operate in the same manner as such vehicles operating intrastate. And if the State may require them to apply for authority, and to make a showing in support of their application, it necessarily follows that, after a hearing, the application of one desiring to do an interstate business may be denied upon any reasonable ground that would be a basis for denial of authority to operate a purely intrastate business.

In this case the appellant has secured from the regulating commission of Oregon a certificate of convenience and necessity to operate over that portion of the route of his proposed line which lies within the State of Oregon. And it has been urged that the State of Washington can not be the judge of the necessity of the people of Oregon for opportunity to travel in interstate commerce between Oregon and points in Washington. This may be conceded, but it may also be said

that the State of Oregon can not create rights for its citizens within the State of Washington, nor in any way control the action of the State of Washington in the exercise of its sovereign powers.

If existing agencies of interstate transportation are not sufficient, and if the action of the State of Washington does in fact operate to obstruct the flow of interstate commerce, it is for the Nation and not the State of Oregon to determine that fact and to remedy it. So long as the Congress refrains from action the State may exercise its power of regulation, even as to persons operating interstate, so long as it does not act in an arbitrary manner.

It may be added, furthermore, that it appears from the record that there are existing agencies of transportation both by rail and by motor vehicles whereby persons desiring to travel to and from points in Oregon from and to points in Washington may do so.

There is no obstruction to the flow of interstate commerce, but the same is already flowing through existing adequate channels.

The Regulation of Motor Vehicle Common Carriers Imposed by the State of Washington is in Aid of Interstate Commerce.

It should be further pointed out that the regulation imposed by the State of Washington, and complained of in this case, is in aid of interstate commerce, and in harmony with the policy and purpose of Congress, as expressed in the Transportation Act of 1920.

In that Act Congress recognized financial strength on the part of interstate carriers as necessary to efficient performance by such carriers of their interstate

functions. Among other provisions contained in the Act for insuring such financial strength is that which forbids the construction of new lines of railroad, except as public necessity and convenience are found to require the same. Hurtful diminution of the business of existing railroads through unnecessary and unwise competition by new railroad lines is thus guarded against.

The Transportation Act, however, left unrestricted and untouched other common carrier agencies which might compete with the rail carriers, such as motor vehicle common carriers. But diminution of rail carrier revenues by the operation of numerous unregulated common carrier motor vehicles, so far as it might occur, would be certainly just as hurtful to rail carriers as a like diminution caused by new competing lines of railroad. Accordingly, when a State, for the protection of interstate carriers, as agencies of intrastate commerce, restrains unreasonable and unjustified competition by motor vehicles, within the State's jurisdiction, such action, so far as it incidentally affects interstate commerce, operates not to burden and obstruct it, but as an aid to such commerce, and in furtherance of the plan and purpose of Congress as expressed in the Transportation Act.

One purpose of the Washington statute clearly is to protect from unjustified and hurtful competition motor vehicle common carriers already operating within the State of Washington, under authority from the State.

As has already been pointed out, this is exactly the same kind of protection which Congress has given to existing rail lines, by restraining the opening of competing new rail lines. The States generally have restricted competition in other branches of public utility

enterprise, and the propriety and lawfulness of such restriction is not questioned. No reason can be suggested why motor vehicles, engaged in an enterprise impressed with a public use, should be exempt from the application of established principles of law, which apply generally to such enterprises. And when a State enacts legislation designed to aid and protect motor vehicles engaged in public service within its borders from unreasonable competition, making no discrimination between those operating interstate and intrastate, so far as such legislation affects interstate commerce carried by motor vehicle common carriers, it is an aid and not an obstruction to such commerce.

Court and Commission Decisions Involving the Question Presented in This Case.

While, of course, not in any respect conclusive upon this Court, we believe it to be of interest and quite persuasive, that the question now under discussion has been many times raised before other tribunals, and always has been determined along the lines contended for herein. Invariably, such common carrier motor vehicle operations have been declared amenable to reasonable and non-arbitrary regulation and control by the local authorities, even though they were claimed to be, and admittedly were "interstate" in character.

The first case of importance in which this question appears to have been discussed is that of *Interstate Motor Transit Co. v. Kuykendall,* 284 Fed. 882, decided in November, 1922, by the Federal District Court for the Western District of Washington (No. Div.), after argument before Gilbert, Circuit Judge, and Cushman and Neterer, District Judges. The opinion in this case (by Neterer, J.) states that the plaintiff,

a Washington corporation, alleged that it was operating an automobile passenger stage service between Seattle, Washington, and San Francisco, California, via Portland, Oregon, and doing no intrastate business in the State of Washington. The court was asked to enjoin the enforcement of the automobile state regulation act of Washington (Laws 1920-21, p. 338), as against the plaintiff, on the ground that such enforcement would contravene the interstate commerce clause of the Federal Constitution. The Court refused the request, and declared that the State "has full power to regulate or prohibit the use of public highways as a place of business by common carriers for hire;" that the State had expended very large sums of money in constructing these highways; that the purpose of this statute ws not to regulate interstate commerce, but to regulate the use of these highways, and that a mere incidental affecting of interstate commerce would not invalidate the act, particularly where it is made to apply to all alike without discrimination.

The next case of interest in this connection is that of *Northern Pacific Railway Co. v. Schoenfeldt*, 213 Pac. 26 decided by the Supreme Court of the State of Washington in February, 1923. In this case the same parties who had been plaintiffs in the Federal case above-mentioned were parties defendant, and here the State Court was asked by certain railroads, whose routes were being paralleled, to enjoin the defendants' operation on the ground that defendants had not complied with the auto stage regulation act of Washington, and that there existed no public necessity for the operation in question. The Court (speaking through Tolman, J.) said:

> "The first and most important question to be decided is whether or not the business conducted by respondent is one which is within the power of the state to regulate, prohibit or burden, and, if so, whether the act in question is such a regulation as is prohibited by the federal constitution."

Section 8 of the Washington act declares that the act does not apply to interstate commerce, "except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress." Said the Court:

> "But it is contended that section 8 of the act specifically excludes such operations as are here shown. So far as it is necessary to construe that section, we think it clearly prospective, enacted with a view to a possible future time when Congress may assert its right to regulate and control such transportation; that it was inserted for the purpose of strengthening the act, and not to limit it, except as the courts might hold that Congress had by proper legislation assumed jurisdiction."

The Court also declared that:

> "It may be conceded that the transportation of passengers from a point within the state to a point without the state, and vice versa, is interstate in its nature; but it by no means follows therefrom that such a business is for that reason free from all state regulation. * * * (Quoting from 12 Corpus Juris, p. 12 re. the relation of the States to the Commerce Clause of the Federal Constitution.)
> * * *
> "The purpose of the act under consideration is clearly apparent from its title and contents, and that purpose is *to regulate the use of the highways of the state by those engaged in carrying on busi-*

> *ness thereon for their own private gain, whether engaged in interstate or intrastate commerce,* and it applies alike to each class without discrimination." (Italics ours.)

This language is, we submit, directly applicable to the situation here presented. As we have seen above, there can be no question as to the right of a State under its residuary and sovereign powers to regulate the use of its highways for private gain, and even where the regulation of such use incidentally affects non-residents or persons engaged in the interstate use of highways it is clear that the State may exercise this sovereign power in any reasonable manner. The primary purpose is not to regulate interstate operations, but the use of the State's highways as common carriers for hire. As stated by the Federal Court in the case of *Interstate Motor Co. v. Kuykendall,* above mentioned, it is only "when a party so engaged (*i. e.*, carrying passengers for hire) seeks to appropriate the highway of a State" that the permission of the State is required.

This is the sense in which the Supreme Court of the State of Washington declared in a recent opinion that,

> "The streets and highways belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a

> place of business or as a mere instrumentality of business is accorded as a mere privilege and not as a matter of natural right. (*Hadfield v. Lundin*, 98 Wash. 657; 168 Pac. 516; L. R. A. 1918E, 909; Ann. Cas. 1916C, 942.)

A case of particular pertinency in this connection is *Liberty Highway Co. v. Michigan Public Utilities Commission*, 294 Fed. 702 (Dec. 11, 1923), in which the Federal District Court for the Eastern District of Michigan, in a *per curiam* opinion (Donohue, Circuit Judge, and Tuttle and Simons, District Judges, sitting) denied an injunction to halt the enforcement of the common carrier automobile stage and truck regulation act of Michigan against an admittedly interstate operator. Said the Court:

> "It is not within the power of the state, even under the guise of an exercise of its police power, to require a license for the privilege of engaging in or otherwise interfering with interstate commerce as such, for that would be to regulate such commerce, the power to do which has been surrendered by the state to Congress. Wabash, St. Louis & Pacific Railway Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; Robbins v. Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694; Bowman v. Chicago & Northwestern Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Harmon v. Chicago, 147 U. S. 396, 13 Sup. Ct. 306, 37 L. ed. 216; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. ed. 719; Barrett v. New York, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. ed. 483; 2 Sault Ste. Marie v. International Transit Co., 234 U. S. 833, 34 Sup. Ct. 826, 58 L. ed. 1337, 52 L. R. A. (N. S.) 574; Askren v. Continental Oil Co., 252 U. S. 444, 40 Sup. Ct. 355, 64 L. ed. 654; Lemke v.

Farmers Grain Co., 258 U. S. 50, 42 Sup. Ct. 244, 66 L. ed. 458.

"The Commerce clause of the Federal Constitution does not, however, deprive the states of the right to reasonably regulate under their police power the use of their public highways, and to that end to require a license and impose a reasonable charge therefor, for the privilege of such use, even if thereby interstate commerce is incidentally affected, provided that such regulation, license, and charge bear a reasonable relation to the safe and proper maintenance and protection of such highways, do not obstruct or burden interstate commerce, and are not in conflict with federal legislation on the same subject enacted within constitutional limitations. Escanaba & Lake Michigan Transportation Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442; St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. ed. 380; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. ed. 385; Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222; Mackay Telegraph & Cable Co. v. Little Rock, 250 U. S. 94, 39 Sup. Ct. 428, 63 L. ed. 863; Interstate Motor Transit Co. v. Kuykendall (D. C.) 284 Fed. 882; Camas Stage Co. v. Kozer, 104 Or. 600, 209 Pac. 95, 25 A. L. R. 27; Northern Pacific Railway Co. v. Schoenfeldt (Wash.) 213 Pac. 26.

"The case of Interstate Motor Transit Co. v. Kuykendall, *supra,* involved a statute similar in nearly all essential respects to Act 209. The plaintiff was engaged in interstate commerce between Seattle and San Francisco, and did no intrastate commerce business. This case was heard by a special court convened under section 266 of the Judicial Code (Comp. St. Sec. 1243), and the statute

was held valid as against the same constitutional objections as are here urged. The Kuykendall Case follows, and is largely ruled by the decisions of the Supreme Court in Hendrick v. Maryland, *supra*, and Kane v. New Jersey, *supra*. In the Hendrick case Mr. Justice McReynolds said:

'The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenace of which are exceedingly expensive. * * * In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as other. * * * This is but an exercise of the police power, uniformly recognized as belonging to the states, and essential to the health, safety and comfort of their citizens, and it does not constitute a direct and material burden on interstate commerce. * * * The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform fair, and practical standard, they constitute no burden on interstate commerce.'

"Plaintiffs have not successfully distinguished the Kane and Hendrick cases from the instant case, in so far as they relate to interstate commerce. The vehicles sought to be regulated by the Michigan statute are commercial vehicles carrying both passengers and freight. It may be well considered that their operations involve a greater menace to public safety and are more destructive of the highways than are private automobiles operated for pleasure, and that they call for a greater degree of

> regulation and a higher compensation for the use of special facilities afforded.'"*

Another case of direct application here is that of *Bush & Sons Co. v. Maloy,* 123 Atl. 61, decided by the Maryland Court of Appeals on June 26, 1923. An application for a permit to do both an intra and an interstate business, or in any event, to do the interstate portion thereof, having been filed, and the applicant having agreed to pay all licenses and comply with all statutes, rules and regulations of the state, the permit was refused by the State Public Service Commission on the ground that "the public welfare and convenience" did not require granting of such permit. An injunction was thereupon requested, to prevent the Commission from enforcing the statute against the applicant. At the risk of burdening the Court we are constrained to quote somewhat *in extenso* from the well considered opinion of Judge Pattison in this case, for its logic appears to us to be irrefutable. The petitioner's chief reliance was in the principles announced in *Crutcher v. Kentucky,* 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649, and *Barrett, President of Adams Express Co. v. New York,* 232 U. S. 14, 34 Sup. Ct. 203, 58 L. ed. 483. Said the Court:

> "In these cases there was an attempt to prohibit persons from engaging in the classes of business therein mentioned until they had first paid the direct license or tax imposed upon them. The requirement of the act here under consideration is that those wishing to use the roads and highways

*A certain provision of the Michigan statute was held to be without the scope of the title, and another (providing for indemnity bonds) was held to burden interstate commerce, but as both such provisions were deemed severable from the balance of the statute, it was, as a whole, declared to be a valid exercise of the state's "police powers."

mentioned in their application for the public transportation of merchandise or freight shall first obtain a permit from the Public Service Commission of the state. Neither the statute nor the order appealed from imposes any burden or restriction, directly or indirectly, upon the plaintiff's right to engage in interstate commerce.

"As stated in the brief of the appellee:

'The state, at the cost of many million dollars to the taxpayers, has established a fine system of improved public highways, and is expending millions more in the extension, improvement, and maintenance of this system.'

"The public highways over which the appellant seeks to operate its motor trucks, as instrumentalities of interstate commerce, were either built by or owned by the state, or the counties traversed by them.

"It was the duty of the Commission under the statute, upon the receipt of the appellant's application for permits to operate the motor truck lines named in the application, 'to investigate the expediency of granting said permits, the number of motor vehicles to be used and the rate to be charged; but, as stated by the statute, if the Commission deemed the granting of such permits prejudicial to the welfare and convenience of the public, they were not only empowered and authorized to refuse the granting of the permits, but it was their duty to do so.

"A statutory regulation of this character is essential not only to the protection of the abovementioned highways built at great expense to the state and counties, but also to the safety of the public who travel upon them. The roads and highways are subject to great damage and injury when used by very large motor vehicles equipped without regard to the effect their use will have upon the roads, and, of course, the injury or damage is

greater when large numbers of them are operated thereon; consequently the number of them used for profit and gain in the transportation of freight or passengers should be restricted to the public need or convenience, and, when the number is in excess thereof, their use becomes prejudicial to the welfare and convenience of the public. The operation of motor trucks upon these highways in most, if not in all, cases is a great convenience to the public, especially to those persons living along the route on which they are operated. It is therefore important that the use of the highways shall be so regulated as to assure the enjoyment of this right to the public, which right may be seriously affected by the failure of those to whom the privilege is granted to give proper service, caused by their inability to operate with a profit, resulting from the excessive number to whom such privilege is granted. The object and purpose of the act is to restrict to the needs of the public the number of motor vehicles used in the transportation of freight or merchandise upon any one route, and thereby avoid the additional injury and damage to the roads or highways, and the danger to persons traveling thereon, that would result from the use of a greater number than the needs and convenience of the public require. It must be that the safety of the traveling public is lessened by the increased number of motor trucks operating upon the roads.

"It is admitted that Congress has enacted no legislation undertaking to regulate the instrumentalities here involved for carrying on interstate commerce, and thus it would seem that this case falls within the class of cases which are controlled by the principles enunciated in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A,

18. (Here follows a lengthy quotation from that leading case.)

* * * * * * * *

"If the contention of the appellant be correct, that the attempted regulation of the use of the highways of this State by the Public Service Commission under the statute mentioned is unconstitutional and void when applied to the appellant and others who apply for permits to engage in the transportation of freight and merchandise from points in this state to points in some other state, then there are no regulations of the use of the highways, nor can there be any until Congress sees fit to pass them, and this it may never do. If it does not, these valuable highways of the state will be subject to the use of motor vehicles of all sizes and character by the persons mentioned. This should not be, and in our opinion is not, the law. But, as we have said, this case is controlled by the principles laid down in the Minnesota Rate Cases, and until Congres passes some legislation regulating the use of said highways, by the instrumentalities here mentioned, the right to do so, within the limitations here mentioned in those cases, is lodged with the legislature in this state."

Another most interesting case is *Choate et al. v. Illinois Commerce Commission,* 309 Ill. 248, where the court set aside an order of the Illinois Commerce Commission granting a certficate of convenience and necessity for the operation of a bus line.

The Illinois law requires the procurance from the commission of a certificate that public convenience and necessity require the transaction of a proposed motor vehicle common carrier business before the same may be begun. The commission had granted such a certificate to a bus line to operate over the paved highways

between Aurora and Elgin, against the opposition of Choate, receiver of the Aurora, Elgin & Chicago Railroad Company, which furnished an electric interurban service between those points. Upon appeal the Circuit Court of Illinois sustained the order of the Commission. Upon appeal from the Circuit Court the Supreme Court reversed the lower court, and set aside the commission's order. We quote the opinion in part:

> "This territory is now served by the Aurora, Elgin & Chicago Railroad Company, which furnishes an electric interurban service. * * * There is no evidence that a complaint was ever filed with the Commerce Commission, or that the commission was ever requested to order the receiver to provide more adequate service. * * *
>
> The railroads in this country have kept pace with the industrial development and the population increase, and the prosperity of the nation has been due to a large extent to the steady expansion of the transportation system. The savings of hundreds of thousands of investors have been massed to build our great network of railroads, and these transportation systems are entitled to protection from irresponsible competition. If shoestring transportation companies, with no money invested in right of way and no reserve capital to provide adequate service, or to protect the public from damage, are permitted to drop in here and there and take the cream of the transportation business from the permanent transportation systems, disastrous results are inevitable. If the permanent highways built at the expense of the people are destroyed, these irresponsible bus lines, that profess to serve the public convenience and to supply public necessity, will leave the public to walk or to provide other transportation facilities.

Orders of the public authorities to furnish adequate transportation facilities would be unavailing because the bus lines would be wholly incapable of complying with the order.

The statute provides the means for compelling the existing transportation systems to provide adequate service for the public. If the people living in the territory through which the Aurora, Elgin & Chicago Railroad operates are not being properly served, they can file a complaint with the Commerce Commission, which has the power to order whatever change or increase in service the evidence warrants. If the existing transportation company does not comply with the commission's order, then a situation may arise where the public convenience and necessity will require the establishment of another system. The theory of the Public Utilities Act is to provide the public with efficient service at a reasonable rate by compelling an established carrier occupying a given field to provide adequate service and at the same time to protect the existing utility from ruinous competition. West Suburban Transportation Co. v. Chicago & West Towns Railway Co. (No. 15273) 140 N. E. 56. By this method the public is protected from paying the cost of the operation of competing systems and a return upon a double investment of capital. No doubt the proposed bus line would accommodate a few individuals in the Fox River valley, but the convenience and necessity which the law requires to support the commission's order is the convenience and necessity of the public as distinguished from that of an individual or any number of individuals."

The questions here under consideration have also come before a number of regulatory commissions in various parts of the country, and, while the decisions of such bodies may not have the force of judicial pre-

cedents, we cite them as entitled to weight, coming as they do from men who are dealing daily with these very problems. (Bluefield v. Public Service Commission, West Virginia Court of Appeals, 118 S. E. 542.) They show complete and unanimous agreement to the effect that this regulation is necessary, lawful and proper and that it does not place an undue or unconstitutional burden upon interstate commerce.

Chambersburg G. & W. St. R. Co., v. Hardman, (Pennsylvania Public Service Commission) P. U. R. 1921C, 628.

Re Walter H. Engeleke, (N. Y. Public Service Commission) P. U. R. 1922C, 71.

Bartels v. Hessler Brothers, (Illinois Commerce Commission) P. U. R. 1922D, 193.

Geneseo-Rock Island Bus Co. v. Hilbert, (Illinois Commerce Commission) P. U. R. 1923E, 311.

Re Jacobson (Washington Department of Public Works) P. U. R. 1923E, 481.

Re Frank Barnes (Washington Department of Public Works) P. U. R. 1923E, 719.

Re Buck and Re Interstate Motor Transit Commission (Washington Department of Public Works) P. U. R. 1923E, 737.

Re Interstate Motor Transit Company (Railroad Commission of California, October 23, 1923, Decision No. 12739.)

In the Matter of the Application for Certificate of Public Convenience and Necessity of the Reo Bus Line of Alexandria, Virginia (State Corporation Commission of Virginia, December 15, 1923, Case No. 1854, P. U. R.)

THE FEDERAL STATUTES PROVIDING FOR FEDERAL AID TO THE STATES IN THE CONSTRUCTION OF POST ROADS IN NO WAY CONFLICT WITH SUCH EXERCISE OF THE STATE'S POWER OF REGULATION OF ITS HIGHWAYS AS IS COMPLAINED OF IN THIS CASE.

The appellant contends that he has a vested right to use the Pacific Highway, by reason of the contribution towards the construction or reconstruction of the same made by the Federal Government under the Federal Aid Act, and approved July 11, 1916, and the Federal Highway Act approved November 9, 1921. The Federal Aid Act provides "that all roads constructed under the provisions of this act shall be free from tolls of all kinds," and the Federal Highway Act that "All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds." It is claimed that the requirement for the payment of license fees, contained in the Washington statute, is in conflict with these provisions relating to "tolls."

It may be admitted that fees required to be paid for licenses to operate motor vehicles over the highways are in the nature of tolls rather than taxes. They are an exaction by the owner of property for the use of it. If, therefore, the language upon which the appellant relies were to be narrowly construed, without regard to other provisions of the statutes in which it is found, or to the purpose of those statutes, or to the circumstances surrounding their enactment, it might be said that the fee provision of the statute of the State of Washington fall within the inhibition of the "toll"

provisions of the Federal statutes. But that would be to follow the letter of the law, and to disregard the spirit of it.

The question is, did Congress, by the quoted words which forbid all tolls, intend to prevent the states from regulating motor vehicles, by the imposition of license fees or registration fees designed to produce revenues for highway maintenance?

It is a primary rule that in construing a statute regard shall be had to the purpose of it. The purpose of the Federal Aid Act, and of the Federal Highway Act, which amends it, is declared in the title of the original act. It was to "aid the states in the construction of rural post roads." The action of the Federal Government in undertaking thus to aid the states was a response to the demand for improved highways which had been produced by the development of motor vehicles. The cost of building improved highways to meet the needs of motor vehicle traffic was so great that they were not constructed by the states fast enough to meet the wishes and the needs of the public; and the construction of those that were built was entailing very heavy public debts upon the states. There was a general feeling that the Federal Government should help meet the emergency caused by the necessity for such extensive improvements in public facilities, which would be used so largely for interstate traffic.

While Congress acceded to the demand for Federal aid, it did so very guardedly. The plan adopted was to aid state construction in the first instance, but to require the states at their own expense to meet the entire cost of maintaining the highways after they were built. Section 7 of the Act of 1916 provided as follows:

"To maintain the roads constructed under the provisions of this Act shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Agriculture shall find that any road in any State constructed under the provisions of this Act is not being properly maintained he shall give notice of such fact to the highway department of such State and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance."

Section 7 of the Act of 1921 provided as follows:

"Before any project shall be approved by the Secretary of Agriculture for any State such State shall make provisions for State funds required each year of such States by this Act for construction, reconstruction, and maintenance of all Federal-aid highways within the State, which funds shall be under the direct control of the State highway department."

When the Federal Aid Act was passed in 1916 the States had already passed laws requiring registration of motor vehicles, and were raising very great sums of money in the form of license fees, or registration fees, for the purpose of highway maintenance and construction. These fees were in the nature of an exaction for the use by the motor vehicles registered or licensed of the highways generally throughout the jurisdiction of the licensing states. Inasmuch as the inter-relating systems of highway which the Federal Government de-

signed to help construct would embrace the principal traffic routes in the several states, it is evident that the exemption of highways receiving Federal aid from the requirements of the state licensing or registration statutes would break down the system whereby the states were obtaining in large part the money expended by them for highway maintenance. At the very time, therefore, that the Congress was endeavoring to induce the States to build more improved highways, and to provide for their maintenance, it used language which, if the appellant's construction of the toll provision is correct, destroyed the sources of revenue upon which the States depended to raise money for highway purposes.*

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*It is interesting to note the completeness with which the "toll" provisions, construed as the appellant contends they should be construed, would cut off some of the states from in any manner deriving revenues from motor vehicle operation for highway maintenance. In addition to registration or license fees, many states have established assessments upon the sale of gasoline, commonly called gasoline taxes. Congress has done this in the District of Columbia. In a state where the constitution requires proportional and equal taxation on all classes of property taxed, however, as in New Hampshire, such assessments may be sustained only if laid not as taxes upon the gasoline sold, but as "a charge or toll for the use of the highways of the State." In its opinion so holding the New Hampshire Supreme Court said:

> "It is a matter of common knowledge that since the advent of the use of automotive vehicles upon highways large sums have been expended in making the conditions more favorable for that class of traffic. No reason appears why the Legislature may not impose upon those who accept the benefits of such highway improvement and maintenance a reasonable charge for the use made. It is upon this ground that the state registration systems for automobiles have been sustained. The purpose of these laws is 'to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious.' *Hendrick v. Maryland, supra*, 235 U. S. 622, 35 Sup. Ct. 142, 49 L. ed. 385. * * * The charge cannot be imposed upon sales of gasoline, generally, but only when the commodity is sold for consumption in the operation of vehicles upon the highways. A charge so limited amounts to the same thing, in substance, as a toll for the use of the highways, and may lawfully be imposed by the Legislature." *In re Opinions of the Justices*, Supreme Court of New Hampshire, 120 Atlantic 629.

Such destruction of those sources of revenue would have operated so directly to thwart the purpose which Congress had in mind that an intent to accomplish it will not be attributed to any ambiguous language. The word "tolls" is ambiguous, in that it is susceptible of use to express a variety of meanings. But it has ordinarily ben used to denote a charge exacted for passing over a *particular* turnpike or bridge or ferry. On the other hand, while the registration fee enforced by the States, whereby a right was obtained with a certain designated vehicle to pass over all highways within the registering State for a certain designated period might be said to be analogous in principle to the exaction of tolls, it is believed that in none of the statutes requiring such registration were the fees referred to as "tolls." In the nomenclature of the time they were not "tolls" but were "license fees" or "registration fees."

The Federal Aid Act forbade the imposition of "tolls" upon highways improved with federal aid. The statute, however, was not anywhere interpreted as forbidding the exaction of the registration or license fees theretofore customarily required by state statutes for the operation of motor vehicles. The States continued, after it was passed, to raise money for highway purposes through the medium of such fees, as they had done before. This supplied a contemporaneous construction of the Act, which was acquiesced in by the Secretary of Agriculture and by the Congress itself. When the Federal Highway Act was passed in 1921 the same laguage was used as had been used in 1916. It is impossible to believe that Congress would have continued to appropriate money for State aid without any attempt to compel observance of its requirement,

if the intent of Congress had been, by the toll provision, to prevent the collection of license fees or registration fees by the states as a prerequisite to the operation of motor vehicles over their highways generally, including those constructed with Federal aid.

If Congress, when it passed the Federal Aid Act, had designed to exempt motor vehicles using highways improved with federal aid from all registration and license fees, it would have used the then familiar terms to describe those fees. If for any reason it had failed to do that in the Federal Aid Act, when it thereafter appeared that the states generally were continuing to exact fees, with the apparent understanding both on the part of federal and state officials that such exaction was not inconsistent with the provisions of the federal act, when Congress came to amend the act in 1921 by the passage of the Federal Highway Act, it would certainly then have made its intent clear. The use of substantially the same words in the Federal Highway Act which were used in the Federal Aid Act was, therefore, in effect, a legislative approval of the construction which had been placed upon the toll provisions of the first act.

That there was a distinction in their proper use between the words "fee" and "toll" is shown by the language of this court in *Kane v. New Jersey*, 242 U. S. 160, where the license fee, exacted by the State as a prerequisite to motor vehicle operation upon the highways of the state, was contrasted with a "toll." In upholding the right of the state to exact the fee, the court said:

> "The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the state to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semiannually, or by a toll based on mileage or otherwise."

This decision was handed down by the court on December 4, 1916, approximately five months after the passage of the Federal Aid Act. It indicated that this court considered that license fees exacted for the right to operate motor vehicles upon the highways of a state were not "tolls."

The question raised in this case, as to the validity of license fee requiremets, was raised in *Liberty Highway Company et al. v. Michigan Public Utilities Commission,* 294 Fed. 703. In that case the court sustained the state statute requiring the payment of license fees, as did the court below in this case. We quote from the opinion on that point:

> "Section 9 of the Federal Highway Act of November 9, 1921, (42 Stat. 212 (Comp. St. Ann. Supp. 1923, sec. 7477¼h)), provides:
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> 'All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds.'
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> "This is not in our judgment intended to refer to license fees such as are here involved (it not being even claimed that such act has reference to the analogous fees imposed under general motor vehicle license laws, or to laws licensing drivers of such vehicles.) State v. Vigneaux, 130 La. 424, 58 South. 135. The most that can be said of it in this connection is that such a provision is merely a condition attached, as between the fed-

eral government and the state, to the contribution of aid provided by federal legislation, and cannot deprive the state of its power and duty as trustee of the public highways for the benefit of the people of the state, to enact reasonable regulations in the exercise of its police power over such highways."

We maintain that the "toll" provisions of the Federal Aid Act and the Federal Highway Act in no way conflict with the legislation of the State of Washington complained of by the appellant.

Respectfully submitted,

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